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No. 94-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PAUL S. ERICKSON,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JACK O'MALLEY
State's Attorney of Cook County
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496

RENEE GOLDFARB
Counsel of Record
ROBERT ROBERTSON
MICHAEL P. GOLDEN
Assistant State's Attorneys
Of Counsel

JAMES E. RYAN
Attorney General of Illinois

ARLEEN C. ANDERSON
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
Attorney for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

1. Whether Illinois may properly limit collateral attacks under its state Post-Conviction Hearing Act to claims which could not have been raised on direct appeal.

2. Whether petitioner was deprived of a fair sentencing hearing where a defense psychiatric witness lied about his qualifications and where the prosecutor exposed those lies during cross-examination and objected to the witness's testimony.

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OPINION BELOW

Petitioner seeks review of a judgment of the Illinois Supreme Court which denied petitioner's claim for relief under the Illinois Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (1992). The opinion of the Illinois Supreme Court is reported at *People v. Erickson*, 161 Ill. 2d 82, 641 N.E.2d 455 (1994).

STATEMENT OF JURISDICTION

Petitioner seeks review of his Petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI

U.S. Const. amend. VIII

U.S. Const. amend. XIV

STATEMENT OF THE CASE

On August 6, 1982, petitioner, Paul S. Erickson, was arrested in connection with the July 31, 1982 rape and murder of 15-year-old Elizabeth Launer. He was subsequently charged by Information with murder, rape, unlawful restraint, concealment of a homicidal death and armed violence. After a jury found him guilty of each offense, petitioner waived his right to have the jury sentence him, and instead, chose to have the trial judge act as the sentencing authority. The trial court found the existence of a statutory aggravating factor and subsequently determined that there were no mitigating factors sufficient to preclude imposition of the death penalty. Consequently, petitioner was sentenced to death for the murder of Elizabeth Launer, an extended term of 60 years' imprisonment for her rape and 10 years for the concealment of her death. This last sentence was ordered to run consecutively to the 60-year-sentence imposed for rape.

On direct appeal, petitioner argued, *inter alia*, that the trial court erroneously denied his motion for a continu-

ance to obtain a psychiatric evaluation for purposes of a sentencing hearing. The Illinois Supreme Court affirmed petitioner's convictions and sentences. *People v. Erickson*, 117 Ill. 2d 271, 513 N.E.2d 367 (1987).

Evidence Presented At Sentencing Hearing

The first phase of petitioner's sentencing hearing began on August 2, 1983. The sentencing judge found the existence of a statutory aggravating factor, namely that petitioner killed the victim in the course of committing another felony.

At the second phase of the sentencing hearing, the prosecution presented evidence that prior to the rape and murder of the victim, petitioner had raped one other woman and attempted to rape yet another. In addition, the prosecution introduced evidence that petitioner had impregnated two juveniles. The prosecution also produced evidence that two weeks before he raped and killed Elizabeth Launer, petitioner had planned to rape and kill a prostitute.

The evidence at the sentencing hearing also showed that petitioner was remorseless for his crimes. After petitioner was arrested for Elizabeth Launer's murder, he discussed the details of the crime with a fellow inmate. During that conversation, petitioner stated that killing the victim "was a big thrill."

Petitioner then proceeded in mitigation, introducing the testimony of Dr. John Weliczko, a therapist who examined petitioner after his arrest. On direct examination during the voir dire on his credentials as an expert, Weliczko testified that he had received a Bachelor of Science degree in psychology and philosophy from Gor-

don College; a master's degree in psychology from Harvard; a master's degree in human nature and human studies from the Hartford Foundation; and a doctorate in psychology from the University of Chicago. However, on cross-examination, Weliczko admitted that his testimony regarding his degrees was incorrect. Weliczko stated on cross-examination that he received a master's degree in theological studies from Harvard Divinity School. In response to a question from the court, Weliczko testified that none of his qualifications was in psychology. The court refused to qualify Weliczko as an expert, but permitted him to testify as a lay witness over respondent's objection.

Weliczko testified that he had been acquainted with petitioner's parents since September, 1982. At that time, petitioner's parents came to Weliczko for counseling regarding their reactions to petitioner's arrest. They familiarized Weliczko with their family and provided insight into petitioner's childhood and adolescence. In addition, Weliczko interviewed petitioner for approximately nine-and-one-half hours.

Based upon his interviews, Weliczko concluded that petitioner suffered from a narcissistic personality disorder. Because of this disorder, petitioner was passive, had low self-esteem and sought approval from others. As a result, petitioner was susceptible to being used by others. Due to his need for approval, petitioner would often exaggerate his accomplishments in an effort to build himself up in the eyes of others. In addition, petitioner's neurosis caused him to be pre-occupied with fantasies about women.

In rebuttal, the People called Dr. Gilbert Bogen of the Psychiatric Institute of the Circuit Court of Cook County.

Prior to trial, petitioner had filed a motion for the appointment of a psychiatrist to examine him for his competency to stand trial and his sanity at the time of the offense. The court granted petitioner's motion and appointed the Psychiatric Institute to perform the examination. Pursuant to the court's order, petitioner was examined by Dr. Bogen on May 4, 1983. Dr. Bogen found that petitioner was both fit for trial and legally sane at the time of the offense. Based on this examination, Dr. Bogen was also able to form an opinion about whether petitioner suffered under an extreme emotional or mental disturbance at the time of the offense.

Dr. Bogen testified that petitioner had an anti-social personality disorder with features of narcissism. Dr. Bogen stated that petitioner was not suffering from any neurosis or psychosis and that he was not operating under any mental illness or defect.

After hearing arguments from both the respondents and petitioner, and weighing all the mitigating factors against the aggravating factors, the sentencing judge found no mitigating factors sufficient to preclude imposition of the death penalty. Consequently, the judge imposed the death sentence.

Post-Conviction Proceedings

Petitioner first filed his post-conviction petition on January 17, 1989. On November 30, 1990, petitioner filed a seventeen count amended post-conviction petition. Respondent filed a Motion to Dismiss on March 5, 1991. After hearing arguments on March 11, 1991, the post-conviction judge found that the petition was without merit and dismissed it.

Petitioner appealed the dismissal of his post-conviction petition to the Illinois Supreme Court. On July 28, 1994, the five member majority of the Illinois Supreme Court affirmed the trial court's dismissal of the post-conviction petition. *People v. Erickson*, 161 Ill. 2d 82, 641 N.E.2d 455 (1994). The court found that petitioner was procedurally barred from raising many of the claims in his post-conviction petition. Specifically, the court found that petitioner was procedurally barred from asserting claims that Weliczko's testimony deprived him of his right to a fair sentencing hearing under the sixth, eighth and fourteenth amendments of the United States Constitution. In addition, the court found that petitioner had waived review of his claims that counsel was ineffective for failing to verify Weliczko's credentials and for presenting Weliczko's testimony and report.

However, the court found that petitioner's ineffective assistance claims regarding counsel's failure to investigate other mitigation evidence and an alleged *per se* conflict of interest were not barred. The court explained that these claims were based upon matters outside the record on direct appeal and, therefore, were properly raised in the post-conviction proceeding. Nevertheless, the court rejected these claims on the merits.

Petitioner filed a Petition For A Writ of Certiorari in which he challenges the Illinois Supreme Court's application of the procedural bar to his claims of ineffective assistance of counsel and to his claims of a denial of due process based upon Weliczko's testimony.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THE ILLINOIS SUPREME COURT'S JUDGMENT DENYING POST-CONVICTION RELIEF FOR PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The writ should be denied because this Court does not have jurisdiction to review the Illinois Supreme Court's judgment regarding application of state law. The Illinois Supreme Court denied two of petitioner's claims of ineffective assistance because petitioner failed to raise them on direct appeal. As a matter of state law, the Illinois Supreme Court held petitioner was procedurally barred from raising those claims under the Illinois Post-Conviction Hearing Act. Because the decision below was based upon an independent and adequate state-law ground, any decision by this court would be merely advisory.[1]

A. The Procedural Bar Applied Below Is An Independent And Adequate State-Law Ground Which Does Not Implicate Any Of Petitioner's Federal Constitutional Rights.

The Illinois Supreme Court held that petitioner was procedurally barred from raising two of his claims of in-

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[1] In issues I and II of his Petition For A Writ Of Certiorari, petitioner seeks review of the Illinois Supreme Court's judgment regarding the waiver of his ineffective assistance claims. (Pet. at 14-25) Because the questions presented by Issues I and II are so closely related, respondent will address them together.

effective assistance of counsel. This decision was based on the procedural requirements of the Illinois Post-Conviction Hearing Act. Because this judgment was based entirely on state law, this Court has no jurisdiction to review it.

The issue presented below was whether petitioner was entitled to relief under the Illinois Post-Conviction Hearing Act for his claims of ineffective assistance of counsel. In his post-conviction petition and his subsequent appeal in the Illinois Supreme Court, petitioner raised four separate claims of ineffective assistance of counsel. Specifically, petitioner alleged that counsel was ineffective for failing to verify Weliczko's credentials, for proffering Weliczko's testimony and report at the sentencing hearing, and for failing to investigate or present other available mitigation evidence. In addition, petitioner alleged that counsel was *per se* ineffective due to a conflict of interest arising out of a fee dispute with petitioner's parents. The Illinois Supreme Court found that petitioner was procedurally barred from raising the two claims directly related to Weliczko's testimony because petitioner could have raised them on direct appeal. The court then considered and rejected the merits of petitioner's remaining two ineffective assistance claims.

Petitioner does not seek review of that portion of the Illinois Supreme Court's judgment which rejected two of his ineffective assistance claims on the merits. Therefore, the relevant issue is whether petitioner is entitled to review of the two "waived" claims under an Illinois statute where the state's highest court finds he has not met the procedural requirements for raising such a claim. Because resolution of this issue necessarily de-

pends upon the interpretation of a state statute, the writ should be denied.

It is well established that this Court "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). "This rule applies whether the state-law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Within the context of direct review of a state court judgment, this rule is jurisdictional. *Coleman*, 501 U.S. at 729.

In its decision below, the Illinois Supreme Court held that as a matter of state law petitioner was procedurally barred from raising the two ineffective assistance claims related to Weliczko's testimony. Specifically, the Illinois Supreme Court stated:

> "Defendant asserts several grounds independently support his [ineffective assistance] claim. Defendant first points to the failure to verify Weliczko's credentials. He then argues that proffering Weliczko's testimony actually undermined the defense strategy.
>
> Neither point may now be considered. Again, defendant's opportunity to raise those arguments was on direct appeal. Any inadequacy there may have been with counsel's representation with respect to Weliczko was evident when Weliczko was cross-examined. Defendant failed to take issue with that representation on direct appeal and so is procedurally barred from doing so here (*People v. Albanese*, 125 Ill. 2d at 104-05) absent some exception. We find none."

Erickson, 161 Ill. 2d at 90, 641 N.E.2d at 459. Because the procedural bar is an independent and adequate state-law ground for denying petitioner relief under the Illinois Post-Conviction Hearing Act, this Court is without jurisdiction to review the Illinois Supreme Court's judgment.

Despite the fact that this case is controlled by Illinois law, petitioner seeks to upset the Illinois Supreme Court's decision with case law from other jurisdictions. Relying on a concurring opinion from *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993) (Easterbrook, J., concurring), petitioner asserts that a trial record is always inadequate to support claims of ineffective assistance of counsel on direct appeal. (Pet. at 17) Petitioner relies heavily on this broad assertion and attempts to support it with various federal and state court decisions. (Pet. at 18-19) In this way, petitioner attempts to create a federal constitutional issue based on the application of the state procedural bar to his ineffective assistance claims.

To the extent that petitioner's argument is limited to ineffective assistance claims which could not be raised on direct appeal, review is unwarranted because the decision below is in accord with the cases cited by petitioner. In fact, in its decision below, the Illinois Supreme Court explicitly recognized that the procedural bar does not apply to claims of ineffective assistance of counsel which could not have been raised on direct appeal. The court explained the application of the procedural bar as follows:

> "the default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense. [Citations omitted.] An ineffective-assistance claim based on what

> the record on direct appeal discloses counsel did, in fact, do is, of course, subject to the usual procedural default rule. [Citation omitted.] But a claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient performance."

Erickson, 161 Ill. 2d at 88, 641 N.E.2d at 458-59. Later, the court followed this rule and considered the merits of two of petitioner's ineffective assistance claims. Thus, contrary to petitioner's argument, the Illinois procedural bar does not stand in isolation.

To the extent that petitioner seeks to create an absolute rule that claims of ineffective assistance may never be subjected to the Illinois procedural bar, the cases he cites are irrelevant. Those decisions do not, and indeed cannot, control the scope of relief available under the Illinois Post-Conviction Hearing Act. Moreover, this Court's decisions clearly establish that claims of ineffective assistance of counsel may be subject to a state-law procedural bar.

Petitioner's argument ignores this Court's decision in *Harris v. Reed*, 489 U.S. 255 (1989). In *Harris*, an Illinois defendant raised several ineffective assistance of counsel claims in a post-conviction petition filed under the Act. The Illinois Appellate Court noted that several of the claims could have been raised on direct appeal. However, that court did not expressly state that those claims were waived. Furthermore, in discussing the merits of an ineffective assistance claim which could not have been raised on direct appeal, the state court also considered the merits of some of the "waived" claims. Upon review of the denial of the defendant's subsequent federal

habeas corpus petition, this Court considered whether the Illinois Appellate Court's decision was sufficient to procedurally bar the defendant from raising the "waived" claims. This Court applied the plain statement rule of *Michigan v. Long*, 463 U.S. 1032 (1983), and held that the claims were not barred.

Petitioner's argument in this case renders the holding of *Harris* nothing more than an advisory opinion. Implicit in this Court's holding in *Harris*, is a finding that the procedural bar of the Illinois Post-Conviction Hearing Act may be applied to ineffective assistance claims. Moreover, *Harris* teaches that in cases where the state court clearly and explicitly relies on the procedural bar to decide an ineffective assistance claim, that bar is an adequate and independent state-law ground sufficient to preclude review. If, as petitioner alleges, the Illinois waiver rule could never bar consideration of an ineffective assistance of counsel claim, then this Court would have had no reason to expound upon the clarity of the state court's decision. Instead, this Court held that federal *habeas* review was proper because the state court considered the merits of some of the "waived" claims without expressly stating that it relied on an independent state law ground. *Harris*, 489 U.S. at 266.

Moreover, this Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984) refutes petitioner's contention that a defendant may never be procedurally barred from raising a claim of ineffective assistance of counsel. In *Strickland*, this Court recognized that "principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." *Strickland*, 466 U.S. at 697. This passage illustrates that ineffective assistance claims

may, in some instances, be raised on direct appeal. Given the fact that such claims are cognizable on direct appeal, there is nothing fundamentally unfair about Illinois courts applying the state procedural bar to those claims which could have been raised on direct appeal.

Petitioner's attempt to convert this state law decision into one involving his federal constitutional rights is nothing more than bootstrapping. Petitioner erroneously contends that he has a federal constitutional right to present his claims in a state created post-conviction proceeding. This Court has consistently held, however, that the federal constitution does not require the individual states to provide a forum for convicted criminals to collaterally attack their convictions. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *United States v. MacCollom*, 426 U.S. 317 (1976) (plurality opinion). It follows that when a state elects to provide such a method of relief, the federal constitution does not dictate any procedures the state must follow. "On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Finley*, 481 U.S. at 559.

Pursuant to petitioner's argument, even though the United States Constitution does not require a state to provide a forum to collaterally attack a conviction, the Constitution mandates that such collateral attacks extend to claims which could have been raised on direct appeal. This is contrary to this Court's holdings in *Murray* and *Finley*.

Under *Murray* and *Finley*, a state which creates a system to collaterally attack a conviction may place reason-

able limits on the claims cognizable under that system. Through the Illinois Post-Conviction Hearing Act, Illinois has exercised its discretion in this area. Under the Act, a convicted defendant may seek relief for claims that he suffered a substantial deprivation of his rights under the federal or Illinois constitutions. 725 ILCS 5/122-1 (1992). However, relief under the Act is limited to those claims which the defendant could not have raised on direct appeal. A reviewing court's decision on those claims which were raised on direct appeal is *res judicata*. *People v. Neal*, 142 Ill. 2d 140, 146, 568 N.E.2d 808 (1990). Failure to raise a claim which could have been raised on direct appeal results in waiver of that claim. *Neal*, 142 Ill. 2d at 146. Through these reasonable limits, Illinois has struck a balance between the State's legitimate interest in the finality of criminal convictions and the defendant's constitutional rights.

In sum, because petitioner's claims were presented under the Illinois Post-Conviction Hearing Act, that Act controls which claims petitioner may pursue. The decision below denied relief for certain claims under the Act because defendant did not present those claims in a timely manner. This holding is based upon independent and adequate state-law grounds and, therefore, the writ should be denied.

B. The Illinois Supreme Court Properly Found That Petitioner Could Have Raised His Claims On Direct Appeal.

In applying the procedural bar to this case, the Illinois Supreme Court properly found that petitioner could have raised the two procedurally barred ineffective assistance

claims on direct appeal. Contrary to petitioner's arguments here and in the state courts, the record on direct appeal contained sufficient evidence for petitioner to raise the claims at that time. Therefore, application of the procedural bar was proper.

To prevail on a claim of ineffective assistance, petitioner has the burden of showing that his attorney's conduct fell below an objective standard of reasonableness and that the result of the sentencing hearing would have been different but for his attorney's conduct. *Strickland v. Washington*, 466 U.S. 668 (1984). In the context of a capital sentencing hearing, a defendant meets the prejudice prong by showing:

> "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Because the record on direct appeal contained evidence to support each prong of the *Strickland* test for each of the two barred claims, application of the procedural bar was proper.

Initially it must be noted that throughout his petition, petitioner co-mingles the various ineffective assistance claims which he presented below. (*See, e.g.*, Pet. at 24) As previously stated, in the state courts petitioner presented four separate claims of ineffective assistance of counsel and the Illinois Supreme Court treated each claim separately. Having framed the issues below as separate claims, petitioner should not be permitted to unite them for purposes of review here. Thus, the relevant inquiry is whether the record on direct appeal contained

sufficient evidence for petitioner to raise the two ineffective assistance claims related to Weliczko's testimony. This inquiry should be made without regard to the alleged evidence of prejudice which petitioner asserts to support the other ineffective assistance claims he raised below.[2]

With respect to his claim that counsel was ineffective for failing to verify Weliczko's credentials, petitioner asserts that he could not have raised this claim on direct appeal because the full extent of Weliczko's fraud was not exposed at the sentencing hearing. Contrary to petitioner's assertions, the record on direct appeal contained ample evidence that trial counsel had not verified Weliczko's testimony. For example, it was clear from the prosecutor's cross-examination of Weliczko that the witness was not a qualified psychologist. Moreover, in response to a question from the court, Weliczko admitted that he did not have any degrees from any institution in psychology *per se*. Based on Weliczko's revelations at trial, petitioner's trial counsel expressed his surprise that Weliczko was unqualified to render an expert opinion. Given this evidence, the record on direct appeal clearly showed that counsel had not verified Weliczko's credentials.

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[2] In this regard, it is significant that petitioner is not challenging the Illinois Supreme Court's ruling that counsel was not ineffective for failing to present other mitigation evidence. The state court found this evidence was insufficient to establish prejudice under the *Strickland* test. Now that this evidence has been deemed insufficient to support the claim for which it was presented, petitioner should not be permitted to rely on this evidence as an excuse for his failure to raise the procedurally barred claims.

In addition, the record on appeal contained evidence of the same prejudice petitioner alleged that he suffered as a result of his counsel's failure to verify Weliczko's credentials. As a result of counsel's alleged deficiencies, petitioner did not have a qualified mental health expert to support his claim of extreme mental or emotional distress. This fact was a matter of record at the time of petitioner's direct appeal. In fact, on direct appeal, petitioner relied on this Court's opinion in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and argued that he was prejudiced by the trial court's denial of a continuance for the purpose of obtaining an expert psychological opinion. In asserting this claim on direct appeal, petitioner asserted the precise prejudice which would have supported an ineffective assistance claim, namely his inability to call a qualified mental health expert. The fact that petitioner raised such a claim on direct appeal indicates that he was aware of this alleged prejudice, and thus he could have also raised the ineffective assistance claim at that time.

Despite the above mentioned evidence, petitioner, who had different counsel for his direct appeal, did not raise an ineffective assistance claim at that time. Instead, petitioner argued on direct review that counsel reasonably believed that Weliczko would be qualified as an expert witness and that the trial court improperly denied his request for a continuance. The fact that on direct appeal the Illinois Supreme Court rejected petitioner's argument regarding his request for a continuance does not mean that petitioner could not have raised an ineffective assistance claim at that time.

Similarly, on direct appeal petitioner could have raised an ineffective assistance claim based on counsel's proffer of Weliczko's testimony and report. In his pleadings and

brief below, petitioner alleged that introduction of this evidence was ineffective because it contained only aggravating circumstances. Thus, the relevant inquiry was whether the proffer of Weliczko's testimony and report was itself ineffective, without regard to the other "available" mitigation evidence. That is, in order for petitioner to establish the prejudice prong of *Strickland* for this claim, he must show there was a reasonable probability that his sentence would have been different had counsel not proffered Weliczko's testimony. *Strickland*, 466 U.S. at 695. Weliczko's testimony, however, is no more aggravating today than it was at the time of his direct appeal. Because Weliczko's testimony was obviously a matter of record on direct appeal, the Illinois Supreme Court correctly found as a matter of Illinois law that this claim should have been raised at that time. As the Illinois Supreme Court found, the record on direct appeal was sufficiently developed that petitioner could have raised the ineffective assistance claims related to Weliczko's testimony. By failing to avail himself of this opportunity on direct appeal, petitioner procedurally defaulted these claims under the Illinois Post-Conviction Hearing Act.

C. Application Of The Illinois Procedural Bar To Petitioner's Ineffective Assistance Claims Did Not Deprive Petitioner Of Due Process.

Petitioner also asserts that he was deprived of due process by application of the procedural bar to his ineffective assistance claims. With respect to this claim, the writ should be denied because there is no due process right to collaterally attack a conviction and because petitioner cannot show that application of the Illinois procedural bar to his claims was fundamentally unfair.

Petitioner's claims have not gained merit simply because he has repackaged those claims in terms of due process. As previously noted, the federal constitution does not require the individual states to provide criminal defendants with a forum to collaterally attack their convictions. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *United States v. MacCollom*, 426 U.S. 317 (1976) (plurality opinion). Having elected to provide such a forum, Illinois is free to place reasonable limits on the types of claims which may be raised under its post-conviction hearing act. Illinois has exercised its discretion in this area by crafting a post-conviction proceeding which is limited to those constitutional claims which could not have been raised on direct appeal. Moreover, in *Harris v. Reed*, 489 U.S. 255 (1989), this Court implicitly held that the procedural bar at issue here was an independent and sufficient state-law ground for denying relief under the Act. Although the question of due process was not raised in *Harris*, it is unlikely that this Court would have passed on the procedural bar in that case if that bar violated a deeply rooted principle of fundamental justice.

In alleging that the ruling below prevented him from litigating his ineffective assistance claims, petitioner mischaracterizes the cause and effect of the Illinois procedural bar. The procedural bar did not prevent petitioner from litigating his claims of ineffective assistance of counsel. Instead, petitioner's failure to avail himself of the opportunity to litigate these claims on direct appeal led to the procedural bar.

Petitioner's due process claim also fails because petitioner cannot show that he was harmed by application of the procedural bar. Petitioner alleges that the Illinois

Supreme Court's decision prevented consideration of mitigation evidence which was not a part of the record on direct appeal. However, the Illinois Supreme Court considered the merits of petitioner's claim that counsel was ineffective for failing to investigate and present available mitigation evidence. The state court found that there was no reasonable probability that petitioner's sentence would have been different had the additional mitigation evidence been presented. Significantly, petitioner does not challenge that finding here.

Despite the Illinois Supreme Court's clear discussion of this additional evidence, petitioner alleges that he will suffer a deprivation of his due process rights if that evidence is not considered in conjunction with his other ineffective assistance claims. Yet petitioner does not offer any explanation of how the evaluation of this evidence would be different if considered in conjunction with the procedurally barred claims. The prejudice suffered as a result of petitioner's failure to present this evidence will not be any greater merely because there are numerous reasons counsel did not present this evidence. As petitioner does not directly challenge the state court's evaluation of this additional evidence, he should not be permitted to attack that evaluation through the guise of a due process challenge to the Illinois procedural bar rule. Once again, petitioner's attempts to repackage a failed sixth amendment claim in due process terms must fail.

II.

THE WRIT SHOULD BE DENIED BECAUSE THE ILLINOIS SUPREME COURT'S JUDGMENT DENYING POST-CONVICTION RELIEF FOR PETITIONER'S CLAIMS BASED ON WELICZKO'S TESTIMONY RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Petitioner also seeks review of the Illinois Supreme Court's judgment rejecting his contentions that Weliczko's testimony deprived him of a fair sentencing hearing under this Court's decisions in *Johnson v. Mississippi*, 486 U.S. 578 (1988) and *Ake v. Oklahoma*, 470 U.S. 68 (1985). Because the Illinois Supreme Court's judgment was based upon an adequate and independent state-law ground, the writ should be denied.

A. The Trial Court's Consideration Of Weliczko's Testimony Did Not Violate Petitioner's Rights Under The Eighth Or Fourteenth Amendments.

Petitioner argued below that he was entitled to a new sentencing hearing because Weliczko, who testified as a defense witness, committed perjury with respect to his credentials. As with the claims of ineffective assistance of counsel related to Weliczko's testimony, the Illinois Supreme Court held that petitioner was procedurally barred from raising this claim. This finding is an independent and adequate state-law ground for that ruling and therefore the writ should be denied. *Michigan v. Long*, 463 U.S 1032 (1983); *Harris v. Reed*, 489 U.S. 255 (1989).

With respect to this claim, the Illinois Supreme Court specifically found:

> "whatever effect Weliczko's testimony might have had was apparent when his credentials were challenged on cross-examination. The opportunity to take issue with Weliczko's testimony was therefore on direct appeal, not in a collateral attack in a post-conviction proceeding."

Erickson, 161 Ill. 2d at 87, 641 N.E.2d at 458. Based on this finding, the court found that petitioner was procedurally barred from raising this issue under the Illinois Post-Conviction Hearing Act. *Erickson*, 161 Ill. 2d at 88, 641 N.E.2d at 459.

Even apart from the procedural bar, this Court should deny the writ because petitioner's claim fails on the merits. The thesis of petitioner's argument is that because the sentencing court was exposed to Weliczko's lies and considered his testimony, the court's sentencing decision was based upon unreliable and materially inaccurate evidence. This argument completely ignores the factual background of Weliczko's testimony and the legal relevance of that testimony.

Because Weliczko testified as a mitigation witness, this case is factually and legally distinguishable from *Johnson v. Mississippi*, 486 U.S. 68 (1988). In *Johnson*, one of the aggravating factors upon which the defendant was sentenced to death was a conviction which was subsequently reversed. Because the reversal came after the sentencing decision, the sentencing court did not take the subsequent reversal into account when imposing sentence. In contrast, here, Weliczko testified as a mitigation witness and the prosecutor exposed Weliczko's lies before the trial judge imposed the death sentence. If the sentencing judge believed Weliczko's lies, he would have attributed increased credibility to Weliczko's testimony.

In the unlikely event that Weliczko's lies actually misled the judge, this increased credibility could only have helped petitioner because Weliczko testified to mitigating circumstances. Given these facts, petitioner cannot possibly show that he was prejudiced by Weliczko's alleged perjury. Therefore, the holding of *Johnson* does not apply to this case.

Petitioner's argument also fails to consider this Court's holdings in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). In *Lockett*, this Court stated:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original)

Lockett v. Ohio, 438 U.S. at 604. In *Eddings*, this Court extended the holding of *Lockett* to require a sentencer to actually consider any mitigation evidence which a capital defendant offers. Under *Lockett* and *Eddings* the sentencing court was required to at least consider Weliczko's testimony and report.

Finally, petitioner's argument must also fail because it would encourage criminal defendants to suborn perjury at their sentencing hearings. Under petitioner's strained reading of *Johnson*, a criminal defendant could introduce perjured testimony at a sentencing hearing in an attempt to avoid the death sentence. If this strategy is unsuccessful, the defendant could later allege a violation of due process based upon this false testimony. Clearly, the constitution does not mandate such result. (*See, e.g., Brewer*

v. Aiken, 935 F.2d 850, 860 (7th Cir. 1991), "It would be absurd to create a rule allowing a defendant to go free if perjured testimony succeeds while at the same time providing for a new trial if the witness is a poor liar.") What is particularly troublesome is that prosecutors would be powerless to prevent this subversive tactic. According to petitioner's reasoning, there is a constitutional violation even when the prosecutor exposes the defense witness's lies to the sentencing authority and objects to his testimony.

That the sentencing court considered Weliczko's testimony does not mean, as petitioner suggests, that he accorded aggravating weight to this evidence. Rather, it merely means that the sentencing judge properly weighed all of the evidence before him and concluded that the mitigating evidence presented did not preclude imposition of the death penalty.

B. Petitioner Is Not Entitled To Review Of His Claim That Weliczko's Testimony Deprived Him Of His Right To An Examination By A Qualified Mental Health Expert.

Petitioner next argues that Weliczko's alleged perjury deprived him of his right to a competent mental status evaluation. The Illinois Supreme Court held petitioner was not entitled to post-conviction relief on this claim because he had procedurally defaulted the claim under the Act. Unlike petitioner's other claims, which he had failed to raise on direct appeal, this claim was barred because petitioner raised a similar claim on direct appeal and the state court's ruling on the issue was *res judicata*. Consequently, the Illinois Supreme Court's decision was based upon independent and adequate state grounds.

Moreover, this claim fails on the merits as well. Petitioner now contends that he had a constitutional right to a competent mental status examination and that he was denied this right because Weliczko was not a qualified mental health expert. Petitioner relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985), as support for this argument. In *Ake*, this Court held that under certain circumstances the constitution requires a State to provide an indigent defendant with access to a competent psychiatrist. The Court stated:

> "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State *provide access* to a psychiatrist's assistance on this issue, *if the defendant cannot otherwise afford one*." *Ake v. Oklahoma*, 470 U.S. at 74 (emphasis added).

Ake, however, does not require a State to provide an indigent defendant with the assistance of a psychiatrist of the defendant's choosing or a psychiatrist who will reach a conclusion favorable to the defendant. *Ake*, 470 U.S. at 83; *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990). *Ake* merely requires a State to provide an indigent defendant with access to one competent psychiatrist. *Ake*, 470 U.S. at 83.

Because petitioner was not indigent, was examined by a competent psychiatrist and had access to any other mental health expert of his choosing, this argument must fails on the merits. *Ake* was based upon the rights of an indigent defendant under the due process clause. *Ake v. Oklahoma*, 470 U.S. at 87. Because the defendant in *Ake* was indigent he was dependent upon the State for the funds necessary to retain a mental health expert. In this

case, petitioner was not indigent and, therefore, was not dependent upon the State for funds to hire a mental health expert. Just as the State is not required to provide an attorney to a non-indigent defendant, so too due process does not require that it supply psychiatric assistance to that defendant. Thus, the holding in *Ake* does not apply here.

Even if petitioner were indigent, his *Ake* claim would fail for at least two reasons. First, neither the State nor the sentencing judge played any role in the selection of Weliczko. Indeed, the State could not have interfered with petitioner's choice of an expert. Petitioner may not claim that the State unconstitutionally denied him access to a competent mental status evaluation because the "expert" of his choosing was unqualified.

This case is analogous to *Burger v. Zant*, 984 F.2d 1129 (11th Cir. 1993). In *Burger*, the defendant claimed in a federal habeas petition that he was denied his right to a competent mental status evaluation. He argued that the appointed psychiatrist he chose "was not licensed or qualified to conduct an appropriate medical examination and misrepresented his credentials." *Burger*, 984 F.2d at 1134. In rejecting his claim, the court found that the State complied with *Ake* because it provided the defendant with the psychiatrist of his choice. *Burger*, 984 F.2d at 1135. Similarly, in this case, the fact that the expert of petitioner's choosing was not qualified does not mean petitioner was deprived his constitutional right to access to a competent psychiatrist.

Second, petitioner's *Ake* claim fails because he was examined by Dr. Bogen, an independent and competent psychiatrist. Under *Ake*, this examination by Dr. Bogen clearly satisfied the requirements of due process.

Moreover, *Ake* does not require a trial court to *sua sponte* appoint a psychiatrist to assist a defendant. *Bowden v. Kemp*, 767 F.2d 761 (11th Cir. 1985). Rather, a defendant must first make a preliminary showing to the court that his mental status will be a significant factor at sentencing before the requirements of *Ake* are triggered. *Clisby v. Jones*, 960 F.2d 925, 929 (11th Cir. 1992). It follows that because petitioner did not make any request for a court appointed psychiatrist after the pre-trial request, that the trial court had no duty to appoint one. Without such a request, the trial court could reasonably conclude that petitioner was satisfied with the examination performed by Dr. Bogen and petitioner's privately retained experts.

In an effort to create a false issue, petitioner attempts to shift the focus away from the examination performed by Dr. Bogen and onto Weliczko's qualifications. In so doing, petitioner merely proves what was obvious at the sentencing hearing—that Weliczko was not a qualified psychologist or psychiatrist. However, as *Ake* only requires the State to provide an indigent defendant with access to one qualified expert, the examination by Dr. Bogen met the requirements of *Ake* regardless of Weliczko's qualifications.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

ARLEEN C. ANDERSON
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Attorney for Respondent

JACK O'MALLEY
State's Attorney of Cook County
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496

RENEE GOLDFARB
Counsel of Record
ROBERT ROBERTSON
MICHAEL P. GOLDEN
Assistant State's Attorneys
Of Counsel